No. 13090.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARTFORD FIRE INSURANCE COMPANY, a corporation,

Appellant,

vs.

ESLI H. DANIELS and HELEN J. DANIELS,

Appellees.

BRIEF OF APPELLEES.

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Jurisdiction.

Appellees concur in the statement of jurisdiction of the District Court and of the appellate jurisdiction of this Court set forth in Appellant's Brief.

Statement of the Case.

This is an action at law upon a fire insurance policy issued by Appellant to Appellees, a copy of which is attached to the complaint. It contains the usual "extended coverage" endorsement which provides ". . . the coverage of this policy is extended to include direct loss by . . . explosion . . ." and "This company shall not be liable for loss by explosion, rupture or bursting of steam boilers, steam pipes, steam turbines, steam engines or fly wheels . . ." [Tr. p. 15.] The policy was issued on December 1, 1948, upon property owned by Appellees in the amount of $10,000.00 and on March 9, 1949, the

coverage was increased to $15,000.00 by endorsement. Both the original policy and the endorsement were executed on behalf of Appellant by Hamman & Avery as its agent. The required premiums were paid, and the policy was in effect at the time of the loss. These facts are admitted by the pleadings. [Tr. pp. 6-25.]

The District Court found that on December 19, 1949, Appellees suffered direct loss to the insured property caused by explosion. [Tr. p. 32.] The nature of the loss is described and the amount thereof is fixed at $14,-450.00. At the trial Appellant admitted the amount of damage to be $14,450.00, as alleged in the complaint. [Tr. pp. 91, 64 and 8.] The District Court also found that on December 21, 1949, two days after the loss, Appellees notified Hamman & Avery, as agents of Appellant of said loss, and inquired of such agents as to whether or not any action was required of Appellees under the policy. Hamman & Avery, acting as agents for Appellant informed Appellees that their loss was not covered by the policy, and that Appellant was not liable, under the policy for any of the loss. Appellees believed and relied upon this statement of Appellant's agent and refrained from filing proof of loss until more than 60 days after the loss. Appellees did not discover that the loss was covered by the policy until more than 60 days had expired. [Tr. pp. 33-34.]

The complaint alleges, the answer does not deny, and the District Court found that on July 31, 1950, Appellees filed with Appellant's main office in California the Proof of Loss attached to the complaint as Exhibit B [Tr. pp. 16 and 18] and on August 8, 1950, Appellant served on Appellees their notice denying the claim attached to the complaint as Exhibit D. [Tr. pp. 19-20; 9-10; 24; 34.]

The Proof of Loss stated "Notice of said loss was given to an agent of Hartford Fire Insurance Company on or about December 21, 1949. Said agent then informed the assured that said loss was not covered by said policy. By reason thereof, the assured refrained from filing proof of loss." [Tr. p. 16.] Under date of August 8, 1950, in reply to the Proof of Loss, Appellant stated:

> "You are further notified that Hartford Fire Insurance Company denies that any loss by explosion, or by any other peril insured against by the afore-referred to policy of insurance, occurred at the premises described therein on December 19, 1949, or at any other time at all." [Tr. p. 20.]

This action was filed in the Superior Court of Los Angeles County on October 9, 1950 [Tr. p. 20], and was removed to the District Court on November 3, 1950. [Tr. p. 6.]

After a trial without a jury the District Court made its Findings of Fact and Conclusions of Law [Tr. pp. 30-35] and rendered judgment against Appellant in the sum of $14,450.00 with interest and costs. [Tr. pp. 36-37.]

Two questions are presented on this appeal:

1. Did the District Court err in determining that Appellees suffered direct loss to their property caused by explosion?

2. Did the District Court err in determining that Appellant may not take advantage of the delay in filing proof of loss?

Summary of Facts.

Appellant's summary of the facts ignores the elementary principles of physics which prove that Appellees' loss resulted from an explosion. Appellant's own experts admitted the existence of the laws of nature upon which Appellees rely.

Appellees' expert was Simon Perliter, a consulting engineer, specializing in hydraulic and structural engineering. [Tr. p. 89.] He made a careful inspection of the damaged property including a survey of the interior of the building. [Tr. pp. 90-91.] Appellant called John E. Shield a consulting structural engineer [Tr. p. 122], Paul E. Jeffers [Tr. p. 141], Jerome Pinkus, a mechanical engineer [Tr. p. 146], and Prof. Robert L. Daugherty, the head of the mechanical and hydraulic engineering department of California Institute of Technology. [Tr. p. 155.] None of Appellant's engineers except Mr. Shield inspected the property, though the damage was unrepaired at the time of trial and was available for inspection. [Tr. pp. 62, 64, 71, 142, 159.] Mr. Shield's inspection was so perfunctory that he did not even observe whether the drainage of rain water was directed toward or away from the house, yet he gave the opinion that the damage in question was caused by rain water. [Tr. pp. 125, 127-128.] The District Court was obviously not impressed with his testimony. [Tr. p. 131.]

The engineers are in substantial agreement on the existence of the natural laws on which Appellees rely. They are:

1. At sea level, at atmospheric pressure, water boils at 212° F.

2. Water under 45 pounds per square inch pressure boils at 290° F. [Perliter, Tr. pp. 92-93; Jeffers, Tr. p. 142; Pinkus, Tr. p. 149; Daugherty, Tr. p. 164.]

3. If water under 45 pounds pressure is brought to its boiling point (290° F.) and the pressure is suddenly released, part of the superheated water will suddenly and violently flash into steam. [Perliter, Tr. pp. 102-103; Jeffers, Tr. pp. 143, 150; Pinkus, Tr. p. 150; Daugherty, Tr. pp. 164-165.]

4. The phenomenon commonly known as "water hammer" is the creation of sudden, excessive and unusual internal pressure in a fluid filled pipe. [Perliter, Tr. pp. 95, 104, 105; Jeffers, Tr. p. 145; Pinkus, Tr. p. 149; Daugherty, Tr. p. 165.]

5. Water hammer can be caused by the sudden introduction of steam into a water filled system. [Perliter, Tr. p. 106; Pinkus, Tr. pp. 148-149; Daugherty, Tr. p. 165.]

6. Water hammer is exceedingly destructive. [Perliter, Tr. p. 95; Jeffers, Tr. pp. 145-146; Pinkus, Tr. pp. 147-148; Ward, Tr. p. 133.]

The Court can take judicial notice of the laws of nature and may refresh its recollection by consulting pertinent reliable works. If the Court examines "Plumbing" by Harold E. Babbitt, Professor of Sanitary Engineering at the University of Illinois (1950), it will find the natural laws applying to this case stated as follows:

> "Water at atmospheric pressure boils at 212° F., but if heated under pressure steam is not formed until the temperature rises much higher. At a pressure of 80 pounds p.s.i. the temperature of the water will rise

to 324° F. before the water boils. This high temperature may soften lead or solder used in piping or in the construction of the boiler, thus releasing the water, which, because of its high temperature, suddenly bursts into steam with explosive violence." [P. 162.]

"Where water under high pressure is heated much over 212° F. trouble will probably be encountered when hot water faucets are opened. The overheated water issuing from the faucet immediately turns to steam, sometimes with explosive violence, and probably with sufficient force to scald the operator of the faucet." [P. 164.]

These principles applied to the undisputed facts show clearly that Appellees' loss was caused by explosion.

The water pressure on the water system in the house was 45 pounds per square inch. [Tr. p. 140.]

On the morning of December 19, 1949, Dr. Daniels was awakened by noise from the hot water heater. [Tr. p. 49.] Upon investigation he found that the thermostat had failed to operate, the gas was burning vigorously, and the typical sound of boiling was heard. [Tr. pp. 50, 73.] He turned off the gas, went to an adjoining bathroom and opened the hot water faucet. Steam under heavy pressure issued from the faucet, under pressure enough to blow out the metal anti-splash strips. He then opened the hot water faucet in the kitchen, and steam issued from it. [Tr. pp. 50-51.] *These faucets were left open all day and no water thereafter issued from either of them.* [Tr. p. 52.] (This fact shows that the pipe broke at the precise time at which the faucet was opened. If the pipe had broken before the faucet was opened, the steam would have been vented through the break and there would

have been no pressure at the faucet. If the pipe had broken later, water pressure would, in the meantime, have been re-established at the faucet. [Tr. pp. 97-98, 102, 152.]) During the night Dr. Daniels heard the sound of running water but was unable to locate its source. [Tr. p. 55.] The following day plumbers were called, and they ultimately found that the cold water pipe supplying the heater had broken at a point about ten feet from the heater. [Tr. p. 59.] When the break was found and repaired pressure was restored to the hot water faucets in the bathroom and kitchen. [Tr. p. 60.]

Within a week's time the whole structure of the house changed—floors buckled and walls cracked as a result of the swelling of the adobe sub-soil from water which saturated it as a result of the broken pipe. [Tr. pp. 60-61; 65; 111.] The nature and amount of damage is not in dispute. [Tr. pp. 91, 64.] Appellant's engineer Shield admitted that the damage resulted from water being released under the house by the broken pipe. [Tr. p. 131.]

On December 21, 1949 [Tr. p. 137] Kenneth Wing, the architect of the house conferred with Robert Avery, the agent of Appellant who had signed the policy on its behalf. [Tr. pp. 135, 111-112, 12, 17.] Mr. Wing told Mr. Avery of the damage to the house, that the thermostat on the water heater failed and pressure was built up because of that fact. [Tr. pp. 112-113.] Mr. Wing asked Mr. Avery if the policy covered the loss. Mr. Avery said that he would check with the Los Angeles Office. Avery reported that the policy did not cover the loss. [Tr. pp. 112-113.]

Shortly thereafter, Dr. Daniels, one of Appellees, called Mr. Avery on the telephone and started to tell him about the loss. Mr. Avery said that he already knew about it

because Mr. Wing had inquired about insurance coverage. Mr. Avery told Dr. Daniels that the policy did not cover such a loss. [Tr p. 67.]

Appellees believed Mr. Avery's denial of coverage and refrained from filing proof of loss. [Tr. p. 67.] More than 60 days thereafter Mr. Avery told Dr. Daniels of a recent case similar to this one, said "I think you are covered," and suggested the filing of a claim. [Tr. pp. 67-68, 138-139.] (The decision obviously was *Olds v. Commercial Union Assurance Co.,* 175 F. 2d 472, decided in January of 1950.)

On April 19, 1950, Mr. Avery discussed the matter with Appellant's Los Angeles claims office and requested that proof of loss forms be sent to Appellees' attorney. [Tr. p. 120.] The claim was immediately assigned to the General Adjustment Bureau for investigation, and later John E. Shield, a consulting engineer was employed by Appellant. [Tr. pp. 121-122.]

Appellees gave Mr. Shield complete access to the house. [Tr. pp. 71, 123-124, 128.] Except for the repair to the broken pipe, the house was in the same condition as when the damage was originally done. [Tr. pp. 62, 64.]

Proof of loss was filed with Appellant's head office in California on July 31, 1950 [Tr. pp. 16, 18], and by letter dated August 8, 1950, Appellant denied liability, reiterating Mr. Avery's assertion that the loss was not covered by the policy. [Tr. p. 20.] Appellant admits that Mr. Avery was its agent authorized to execute and deliver policies of insurance. [Tr. p. 24.] His duties as agent included the reporting of losses and claims coming to his knowledge. [Tr. p. 139.]

Direct Loss by Explosion Was Proved.

The broad language of the policy covers all explosions except only "explosion, rupture or bursting of *steam* boilers, *steam* pipes, *steam* turbines, *steam* engines or fly wheels." [Tr. p. 15.] The pipe here involved was a water pipe, not a steam pipe. Steam was not used in the house. [Tr. p. 47.]

Appellant argues that the word "explosion" as used in the policy "is to be taken as understood by an ordinary person." (Brief, p. 10.) This is but another way of saying that the meaning of the word "explosion" is a question of fact. If so, the question is not open to review on appeal. Judge Harrison found that the occurrence proved was in fact an explosion. [Tr. pp. 26, 32-33.] Does Appellant assert that he is not an "ordinary man?"

Gasoline and gunpowder are not the only causes of explosions. As Appellant's own policy indicates, an explosion can occur in solid metal. The very clause here in question excludes "explosion, rupture or bursting of . . . fly wheels."

In *Lever Bros. v. Atlas Insurance Co.,* 131 F. 2d 770, a large tank containing cotton oil burst with great violence and noise. The insurance company claimed this was not an explosion because the damage resulted from great internal stresses in the metal of the tank which were released by the vibration caused by a passing locomotive. The Court said:

> ". . . where there are pent-up, imprisoned forces, in such state of instability that the vibration of a passing locomotive is sufficient to cause their release with the force and violence testified to in this case, *that is an explosion.*" (Emphasis added.)

The Lever Bros. explosion occurred in 1940, eight years before this policy was issued, and the case decided in 1942, six years before this policy was written. The implications of the *Lever Bros.* decision must have been well known to Appellant at the time this policy was issued. If Appellant had intended to restrict the explosion coverage of its policy to the typical gasoline and gunpowder types it had ample time to do so. Instead, Appellant placed no limitation upon the meaning of the term "explosion" other than as applied to *steam* boilers, etc., and fly wheels.

In *Bower v. Aetna Ins. Co.,* 54 Fed. Supp. 897, plaintiff's home was insured against loss by explosion. While plaintiff was away the water in the heating radiators froze, expanded and burst the pipes, resulting in severe water damage to the property. The Court held this to be a loss by explosion.

L. L. Olds Seed Co. v. Commercial etc. Ins. Co., 179 F. 2d 472, is a case strikingly similar to the one at bar. There plaintiff's stock of seeds was insured under a fire policy containing an extended coverage endorsement similar to the one here involved. As in the case at bar, a cold water pipe was ruptured as a result of water hammer. As here, it was argued that the bursting of a cold water pipe caused by water hammer is not an explosion. As here, the evidence showed that water hammer is a sudden, excessive pressure far greater than normal. The trial judge, in his instructions to the jury, defined an explosion as a "sudden, accidental, violent bursting, breaking

or expansion caused by internal force or pressure which may be and is usually accompanied by some noise." The jury found that an explosion had occurred. Affirming a judgment in favor of plaintiff, the Court said:

> "Professor Kessler, a widely known expert in hydraulics, who has specialized in the study of water hammer, testified that in his opinion the pipe in question burst from 'a sudden excessive pressure, far' greater than the normal pressure in the (water) main, and that the bursting 'would be accompanied by a violent increase in pressure, and undoubtedly noise would occur.' Another expert testified that in his opinion the pipe burst because of water hammer which is 'a very sudden and destructive force of internal pressures—sudden and instant violent pressure.'
>
> "Defendant's argument that cold water does not explode is beside the point. It was the container, the pipe, that gave way with violence. And it should be kept in mind that *the insurance policy did not give protection against big explosions only; the protection afforded was against all explosions, except those specifically excluded.* Defendant argues that the break in the pipe was small, but considering that it was only a 2" pipe, the jagged-edge tear or opening was relatively of considerable size.
>
> "We think that under the evidence *the question of whether an explosion occurred was a jury question.* Considering the physical exhibits, such as the ruptured section of the pipe, as well as the oral testimony, it was permissible for the jury to find that an explosion had occurred. Since plaintiff's damages were a direct consequence thereof, the judgment for the plaintiff must be and is affirmed." (Emphasis added.)

The case at bar, on its facts, is stronger than the *Olds* case. It appears from the record in the *Olds* case that the water hammer which destroyed the pipe was created in the city main as a result of the sudden opening and closing of valves incident to the fighting of a fire in the neighborhood. The record in the *Olds* case also shows that the water in the pipes never attained a temperature of more than 70° F. Wholly absent was a change of state from liquid to gas, as appeared in the case at bar. The *Olds* case determines that the bursting of a pipe by reason of water hammer alone constitutes an explosion within the meaning of the same extended coverage endorsement as the one here involved. In the case at bar the pipe burst as a result of water hammer and the water hammer was created by the sudedn violent bursting into steam of superheated liquid water. In the case at bar the elements of a conventional explosion were present. A change of state occurred from liquid to gas when Dr. Daniels opened the bathroom faucet, releasing the pressure on the system and causing part of the water superheated to 290° suddenly and violently to flash into steam. [Pinkus, Tr. p. 50.] The flashing of water into steam was accompanied by violence. [Perliter, Tr. pp. 102-103; Daugherty, Tr. pp. 164-165.] It was accompanied by noise. [Pinkus, Tr. p. 151; Jeffers, Tr. p. 146.] The energy released by the water flashing into steam was transmitted to the water pipe creating water hammer. [Perliter, Tr. p. 99; Daugherty, Tr. p. 165.] The internal pressures momentarily created by water hammer are intense, far in excess of working pressures. [Perliter, Tr. p. 95; Jeffers, Tr. p. 145; Pinkus, Tr. pp. 147-148.] Indeed, they are theoretically infinite. [Perliter, Tr. p. 95.] The destructive power of water hammer is well

known. In research work Mr. Pinkus destroyed 12-inch cast iron valves with water hammer—valves which stood 5 feet high. [Tr. pp. 147-148.]

At the trial defendant's engineer Shield, the only one who had inspected the Daniels' property, expressed the opinion that the pipe broke because rain water seeped beneath the foundations of the house. Mr. Shield, however, did not observe whether rain water drained toward or away from the house. He did not take into consideration the fact that the pipe broke at the time Dr. Daniels opened the hot water faucet. [Tr. p. 130.] The District Court was obviously not impressed with his testimony. [Tr. p. 131.]

One of the most significant circumstances in the case is the fact that the pipe broke at the very time Dr. Daniels opened the hot water faucet. If the break had occurred prior to that time there could have been no steam pressure on the bathroom faucet. [Perliter, Tr. p. 99; Daugherty, Tr. pp. 162-163.] If the pipe had not broken at the time the hot water faucet was opened water circulation would promptly have been re-established. [Perliter, Tr. p. 98; Daugherty, Tr. pp. 163-164.] Thus it is clear that the flashing of the superheated water into steam, the creation of water hammer and the breaking of the pipe occurred at the same time. Appellees' explanation of the occurrence is in accord with the facts and the fundamental laws of nature above referred to.

On page 8 of its brief Appellant says:

> "Appellant produced a number of highly qualified experts who testified that the break in the pipe could not have been caused by internal pressure or by water hammer and all of whom concluded that the break in the pipe occurred through external tension,

probably due to the swelling of the adobe soil due to recent heavy rains."

The record does not bear out this assertion. Appellant's witness Jeffers was unwilling to say that it was impossible that water hammer was the cause of the break in the pipe. [Tr. p. 142.] His only testimony even tending to support Appellant's assertion is:

"Q. Now, you speak of the possible differential movement of the building as a possible cause of the break in this line. Did you observe any evidence of that? A. I didn't even see the building.

Q. You haven't seen the building at all? A. No." [Tr. p. 142.]

Professor Daugherty frankly said, "Of course, *I don't know what caused the pipe to break in the first place.* I could only hazard a *guess* on that. I *imagine* that the pipe must have broken because of some pull, some tension on it." And, he also said, "The fact that after this break there was a gap in the pipe would indicate somehow or other that there had been some shifting of the foundations or otherwise that would have put this pipe under tension and pulling that in two at that point and leave the gap. *That is only a guess on my part* because I can't speak with any authority on that, not having been down there and investigated it personally as to what really took place." [Tr. pp. 158-159.] Again, he frankly admitted "I am unable even to guess how this accident occurred, as I said before." [Tr. p. 163.] Mr. Shield was the only witness who gave the opinion that the pipe broke because of alleged distortion in the house caused by swelling of adobe soil due to rain. [Tr. p. 125.] But he neither inspected for nor found cracks in the foundations. [Tr. pp.

128-129.] He did not even observe the direction of water drainage. [Tr. p. 128.] Thus it appears that Appellant's explanation of the loss is not supported by the evidence and the District Court properly accepted Appellees' proof of the cause of the loss. The decisions cited are the only ones found which directly apply to the facts of this case, and all of them support the findings of the District Court.

Delay in Filing Proof of Loss Was Waived by Appellant.

Most of Appellant's Brief is devoted to the argument that even if Appellees' loss is covered by the policy, they are entitled to nothing because formal, written proof of loss was not filed with the insurance company's San Francisco office within 60 days after the explosion.

The policy [Tr. pp. 12-15] sets forth the following requirements:

1. Assured must give written notice of loss without unnecessary delay. [Tr. p. 13, line 85.]

2. Within 60 days after commencement of explosion assured must file sworn written proof of loss with insurance company's main office in California. [Tr. p. 13, line 89.]

3. "If the company claims that the preliminary proof of loss is defective and within *five days* after receipt thereof (without admitting the amount of loss or any part thereof) notified in writing the insured, or the party making such proof of loss, of the alleged defects (specifically stating them) and requests that they be remedied by verified amendments the assured or such party within ten days after the receipt of such notification and request must comply therewith, or if unable to do so, present the company with an affidavit to that effect." [Tr. p. 13, lines 98-102.]

Admittedly, proof of loss was filed with Appellant's main office in California on July 31, 1950 [Tr. p. 19] Appellant does not claim that the proof of loss is defective in any particular except that it was filed more than 60 days after the explosion and that Appellees' loss was not caused by explosion. If the claim is valid, the amount demanded is admittedly correct. [Tr. pp. 91, 64.]

The record contains much significant evidence in addition to that printed in Appellant's Brief.

On December 21, 1949, two days after the explosion, both Dr. Daniels and Kenneth Wing talked to Robert Avery, Appellant's agent. [Tr. pp. 111-113, 137.] Mr. Wing explained that the thermostat on the hot water heater failed, that pressure had built up, a water line had broken and the building had been damaged. [Tr. pp. 112-113, 135-138.] Dr. Daniels also talked to Mr. Avery on the same subject, started to explain the occurrence and was told that Mr. Avery already knew all about it. [Tr. pp. 75-76, 136.] Both Dr. Daniels and Mr. Wing specifically asked if the loss was covered by the policy and both were told by Mr. Avery that it was not covered. [Tr. pp. 75-76, 112-113, 134-139.] Mr. Avery was told enough so that he recognized the pertinence of the *Olds* case when he learned of it in April, 1950. [Tr. p. 138.]

Mr. Avery did not tell Appellees to send written notice to the company's San Francisco office, or to file written proof of loss within 60 days. He told them the loss was not covered by the policy. [Tr. pp. 136-138.] Within two weeks Mr. Avery discussed the matter thoroughly with John Kilgore, a special agent of Appellant. [Tr. p. 136.] Relying upon Mr. Avery's denial of liability Appellees refrained from filing proof of loss. [Tr. p. 67.]

In April of 1950 Mr. Avery read of the *Olds* case, called Dr. Daniels, told him the circumstances and suggested that he file a claim. [Tr. p. 139.]

On April 19, 1950, Mr. Avery called Appellant's Los Angeles office and requested that proof of loss forms be sent to Appellees' attorney. Mr. Roy O. Elmore, Appellant's resident manager, called Mr. Avery's partner for information about the claim. [Tr. p. 120.] Though more than 60 days had then elapsed after the explosion it does not appear that any objection was made on that ground. Instead Mr. Elmore assigned the claim to the General Adjustment Bureau for immediate investigation. Several days later a preliminary report was received. The bureau was then ordered to proceed with a "very definite investigation, as far as he could go, and report back to us." John E. Shield, a consulting engineer was then employed to make a further investigation. [Tr. pp. 120-122.]

On May 2, 1950, a report of Perliter & Soring, Appellees' engineers was submitted to General Adjustment Bureau for the account of Appellant. [Tr. p. 16.]

On May 18, 1950, Mr. Shield went to the property. Later he returned with two laborers and was shown through the house by Mrs. Daniels. He returned later with a mechanical engineer. He interviewed the plumbers, the General Adjustment Bureau, Mr. Wing, the architect and Mr. Reynard, his associate. He was given a copy of the house plans. He had complete access to the house. [Tr. pp. 71, 122-124.] He then obtained rainfall data

from the U. S. Weather Bureau and the Palos Verdes Water Company. [Tr. pp. 125-126.] The damage had not been repaired. except the broken pipe. [Tr. p. 70.] He received complete cooperation from Appellees. [Tr. pp. 71, 128.]

Appellant's investigation appears to have continued until about July 10, 1950, and Appellees were not notified of its action until after that date. [Tr. p. 16.]

It is significant that this long and extensive investigation was undertaken merely on the basis of a phone call from Mr. Avery [Tr. p. 120], and no question appears to have been raised regarding the delay in filing proof of loss.

Proof of loss was filed with Appellant's main office in San Francisco on July 31, 1950. [Tr. pp. 18, 16, 19-20.] *Eight days* later, August 8, 1950, Appellant wrote to Appellees denying liability under the policy on the ground that the loss was not caused by an explosion. Then, for the *first* time, Appellant objected to the delay in filing the proof of loss. [Tr. pp. 19-20.]

Appellant argues that even if Appellees' $14,500.00 loss is covered by the policy they cannot recover because an otherwise proper proof of loss was not filed within 60 days. But Appellant, without any excuse, appears also to be guilty of delay. Admittedly the proof of loss was received on July 31, 1950. [Tr. p. 19.] The policy provides that if the company claims that the proof of loss is defective it may, within *five days* notify the assured of such defects and require them to be remedied by amendments or by an affidavit that the assured is unable so to do. [Tr. p. 13, line 98.] Appellant did not even write its notice until August 8, 1950, *eight days* after the proof of

loss was received. [Tr. p. 19.] Appellant has thus waived its right to object to the delay in filing of proof of loss. We apprehend that Appellant will argue that it would have been idle to object to the delay in filing proof of loss, the 60 days having already passed. But that would have been no more an idle act than filing proof of loss within the 60 day period—because Appellant has consistently denied liability for the loss just as Mr. Avery had already done for it.

The District Court decided that Appellant had clothed Mr. Avery with all indicia of authority as its agent. He could prepare and sign policies on behalf of the company, collect premiums, increase coverage on property, and endorse policies. If he could issue policies he must necessarily have been authorized to discuss policy coverage with the assured. It was his duty to report losses. In this case the Appellant accepted notice of loss merely on the basis of a call from Mr. Avery, for it appears that on April 19, 1950, he asked Mr. Elmore to send proof of loss forms to Appellees' attorney, and in its letter of August 8, 1950, the company admits notice of loss on April 19, 1950. [Tr. pp. 19, 121.] This informal call from Mr. Avery was enough to launch a long and intensive investigation including the employment of consulting engineers. Mr. Avery's authority to deny liability under the policy was not questioned until Appellant answered the complaint in this action.

In the course of the investigation brought about by Mr. Avery's call to Mr. Elmore Appellant's engineers were given full access to Appellees' home, their engineer's report and plans of their house. Appellant gave serious consideration to Appellees' claim, with full knowledge that the 60-day period for filing proof of loss had already passed.

In spite of this Appellant did not object to the delay in filing formal proof of loss.

Section 554 of the California Insurance Code provides:

> "§554. *Waiver of delay*: Delay in the presentation to the insurer of notice or proof of loss is waived *if caused by an act of his*, or if he omits to make objection *promptly* and *specifically* upon that ground." (Emphasis added.)

Admittedly from April 19 to August 8, nearly 4 months, Appellant knew that Appellees claimed that their loss was caused by explosion and that they sought indemnity under the policy. No objection to the delay was made during that period. Instead, Appellant conducted its investigation and accepted Appellees' full cooperation in connection therewith. Clearly, therefore, regardless of the nature and extent of Mr. Avery's authority, Appellant waived the delay in making proof of loss.

Appellant now argues that Mr. Avery's denial of liability was merely an academic discussion and that obviously Mr. Avery was not speaking or presuming to speak or act on behalf of Appellant. This is not supported by the record. Mr. Avery was admittedly Appellant's agent. [Tr. pp. 12, 66.] He signed the policy in question as such agent. [Tr. p. 12.] His duties as such agent included the reporting of losses and claims of which he acquired knowledge. [Tr. p. 139.] Mr. Wing specifically asked whether or not this loss would be covered by the "comprehensive clause" and was told that Avery would check it with Los Angeles. [Tr. p. 112.] Mr. Avery discussed the matter thoroughly with the special agent of Appellant. [Tr. p. 136.] Appellees had suffered a $14,450.00 loss. That was not academic. They had pur-

chased and paid for insurance and asked the agent of the insurer if the policy covered their very real and severe loss. It would be difficult to conceive of a less academic discussion.

Appellant concedes that the general rules of agency apply to insurance contracts. (Br. p. 32.) It is a fundamental principle of the law of agency that ratification by the principal is equivalent to precedent authority in the agent.

The question here involved as we see it is not whether Mr. Avery had authority to waive the filing of proofs of loss within 60 days. The question is whether Mr. Avery had authority to tell Dr. Daniels that the loss was not covered by the policy, and if he lacked such precedent authority whether or not his act was ratified.

It is clear from the evidence that Mr. Avery told Dr. Daniels that this loss was not covered. [Tr. p. 67.] That he knew the facts is clear for he immediately recognized the *Olds* case as being in point when its existence was brought to his attention in April of 1950. [Tr. pp. 138-139.]

Aside from the apparent authority with which Appellant clothed Mr. Avery, it is clear that his act in notifying Appellees that their loss was not covered by the policy has been unequivocally ratified by Appellant, by every act which it has performed, beginning with its notice dated August 8, 1950, and continuing to the filing of its brief in this Court.

On August 8, 1950, after a full investigation of the facts, Appellant formally denied that "any loss by explosion, or by any other peril insured against" by the policy had occurred. [Tr. p. 20.] Appellant's answer in

this case denied that the loss was caused by an insured peril. [Tr. p. 23, 8.]

At the trial Appellant unsuccessfully tried to prove by numerous witnesses that the loss was not covered by the policy.

In this Court a similar contention is urged. Certainly, all of these acts must have been performed with the authority of Hartford Fire Insurance Company.

Thus, Appellant with full knowledge of all of the facts, obtained from its own detailed investigation and from the evidence produced in Court, still does exactly the same thing that Mr. Avery did on December 21, 1949—it denies most emphatically that the loss is covered by its policy of insurance. It would indeed be difficult to find more clear or unequivocal ratification of Mr. Avery's act in telling Dr. Daniels that his loss was not covered by the policy. The legal situation, therefore, is exactly the same as if Appellant's fountainhead of authority in San Francisco or in Hartford had told Appellees on December 21, 1949, that their loss was not covered by the policy.

It has long been settled by well considered decisions that if, within the time during which proofs of loss may be filed, an insurance company denies liability under its policy the filing of proof of loss is waived.

Francis v. Iowa, etc. Ins. Co., 112 Cal. App. 565;

Grant v. Sun Indemnity Co., 11 Cal. 2d 438;

Royal Insurance Co. v. Martin, 192 U. S. 149, 42 L. Ed. 385;

Fidelity Phoenix Insurance Co. v. Haywood, 71 F. 2d 834;

Bank of Oroville v. Minnesota, etc., Insurance Co., 132 Cal. App. 510;

Martin v. Postal, etc. Insurance Company, 31 Cal. App. 2d 329;

Mercer Casualty Co. v. Lewis, 41 Cal. App. 2d 918;

Paez v. Mutual, etc. Insurance Co., 116 Cal. App. 654.

In *Francis v. Iowa, etc. Insurance Co.,* 112 Cal. App. 565, the insurance company denied all liability under its policy within the 60-day period allowed for filing proof of loss. No proof of loss was ever filed. The Court held that the company's denial of liability within the 60-day period waived the filing of proof of loss. The Court said:

> "The insurance company waived the provision of the policy requiring sworn proof of loss to be furnished by denying its liability. In *Lee v. United States Fire Ins. Co.,* 55 Cal. App. 391, 396 [203 Pac. 774, 776], it is said:
>
> 'The denial of such liability prior to the expiration of the time to make proof of loss is a waiver of the condition of the policy requiring such proof. (*Farnum v. Phoenix Ins. Co.* 83 Cal. 263 [17 Am. St. Rep. 233, 23 Pac. 869]; *Royal Ins. Co. v. Martin,* 192 U. S. 149 [48 L. Ed. 385, 24 Sup. Ct. Rep. 247, see also, Rose's U. S. Notes].)' "

The Court also said:

> "In the absence of fraud on the part of an insured, a court should carefully examine the evidence regarding the failure to furnish proof of loss by fire *so as to avoid a forfeiture of legitimate claims merely because of technical omissions.*" (Emphasis added.)

In *Grant v. Sun Indemnity Co.,* 11 Cal. 2d 438, the Court said:

> "It is a well-recognized rule, which we conclude is applicable to the special circumstances here, that the insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit."

In *Royal Ins. Co. v. Martin,* 192 U. S. 149, 42 L. Ed. 385, the Court said:

> "A general, absolute refusal to pay in any event, or a denial by the company of all liability under its policy, dispensed with such formal proofs as a condition of its liability to be sued, and opened the way for a suit by the assured in order that the rights of the parties could be determined by the courts according to the facts as disclosed by evidence."

The Courts generally look with disfavor upon technical defenses which deny an insured a recovery for an insured loss. In *Bank of Oroville v. Minnesota etc. Ins. Co.,* 132 Cal. App. 510, the Court said:

> "The law abhors forfeitures of contracts. The question of a waiver of this provision of an insurance policy depends upon the circumstances of each particular case. Where a cause of action upon an insurance policy for recovery of loss sustained on account of fire is otherwise valid, the question of *a mere delay in filing the required proof of loss, or the waiver thereof, will be determined in favor of the insured when this may be reasonably done without violence to the facts of the case.* In 5 Joyce on Insurance, sec-

ond edition, page 5564, it is said, concerning the question of waiver: 'The question concerning whether or not there has been a waiver of this provision must in all cases depend upon the circumstances of each particular case. *The courts will construe this provision, as a rule, against the insurer, and will not scan very closely evidence introduced by the insured tending to rebut a technical forfeiture.*'" (Emphasis added.)

Fidelity-Phoenix Ins. Co. v. Haywood, 71 F. 2d 834, is strikingly similar to the case at bar. It was an action on a fire insurance policy which required the filing of proof of loss within sixty days after the fire and also provided that no agent had power to waive any policy provision except by writing endorsed thereon. A fire loss occurred. Before the expiration of the sixty-day period for filing proof of loss, Rieger, the local agent of the insurance company, notified the insured that his policy was cancelled as of the date it was issued on the ground that at that time the assured did not have title to the property. Proofs of loss were not filed within the sixty-day period. The insurance company defended on two grounds: First, that the assured did not own the property at the time the policy issued and, secondly, that proof of loss was not filed within the sixty-day period. The Court found that the assured did own the property at the time the policy was issued and that the filing of proof of loss was waived by the denial of liability by Rieger. The Court pointed out that Rieger, the local agent, was authorized to solicit business, issue policies and collect premiums, but that such

authority did not include adjustment of losses. Affirming the judgment of the District Court, the Circuit Court said:

> "We come then to the somewhat narrow question as to the *authority of the local agent to bind the insurer by a denial of liability.* The evidence of the agent Rieger was that he was authorized to solicit business, issue policies, and collect premiums. Clearly this authority does *not* include adjustments of loss. The adjuster was Harrison. Harrison did not deny liability, although he refused to furnish the assured with proof of loss forms. We do not, however, base our conclusion as to waiver upon any acts of Harrison. It was Rieger, however, who returned the premium, and notified the assured of the cancellation of his policy. Such acts are not ordinarily within the authority of one employed to solicit business. The authority to cancel a policy, and the statement of the reasons for such cancellation, are inseparably associated. The inference is inescapable that Rieger had either general authority to cancel policies for the reasons given or was expressly empowered to do so in the instant case. *Aside from this* the insurer asserts the cancellation of the policy by it. *It cannot now deny its agent's authority to send the notice of cancellation, nor to specify the reasons upon which such cancellation was based, and this is in our view equivalent to a complete denial of liability.*" (Emphasis added.)

If the quoted portion of the *Haywood* case is read with the name "Avery" substituted for the name "Rieger" the pertinence of the decision will be doubly apparent.

See also, *New York Life Insurance Company v. Eggleston*, 96 U. S. [6 Otto] 572, 24 L. Ed. 841, wherein the Court said on the subject of waiver:

> "The representations, declarations or acts of an agent, contrary to the terms of the policy, of course will not be sufficient, unless sanctioned by the company itself. . . . But where the latter has, by its course of action, ratified such declarations, representations or acts, the case is very different."

If Mr. Avery had admitted liability and had adopted a course of conduct different than that which has consistently been followed by Appellant it might have ground for complaint. But Mr. Avery, either with or without prior authority, did exactly what Appellant is now doing and has consistently done since it acquired knowledge of all of the facts. We submit that to allow an insurance company to repudiate an obligation because its agent did exactly what the very highest authority in the company would have done and is now doing would be a gross miscarriage of justice.

Appellant admits that Mr. Avery had authority to issue policies. In order to do this he must have had knowledge of the perils to be insured against and to discuss those perils and the coverage of policies with the assured. If he had authority to discuss coverage before a loss it is difficult to understand why he could not discuss policy coverage after a loss had occurred.

Conclusion.

The Trial Court's finding that Appellee's loss was caused by explosion is supported by the evidence and the law. The insurance company's agent received almost immediate notice of the loss. He told Appellees that the loss was not covered by the policy. Within two weeks thereafter he discussed the matter with Appellant's special agent. In April of 1950 he called Appellees' attention to the decision in the *Olds* case and recommended the filing of a claim. The Los Angeles Claims Office then undertook a complete investigation and after that was finished confirmed its agent's denial of liability. In order to avoid payment of a just claim it now asserts that its agent was not authorized to deny liability on its behalf. Appellant does not show how the delay in filing proof of loss has prejudiced it in any way.

We believe that the findings of the District Court are in accord with both the facts and the law applicable to the case and that the judgment should be affirmed.

Respectfully submitted,

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Attorneys for Appellees.